exception.[10] Possibly the present decision goes further than any other in its language,[11] but whether by extension of administrative powers or by analogy with the recognized exception, the trend of the courts is certainly towards the achievement in similar cases of the result reached in the principal case.

RIGHTS OF A LIFE TENANT IN A PRIVATE CEMETERY. — Interests in burial lots may be granted either by a document under seal, or by any other agreement. If there is a conveyance under seal, the vendee obtains either a fee simple [1] or an easement,[2] according to the tenor of the instrument and the construction of it warranted by circumstances.[3] If the sale of a burial lot is by mere oral or written agreement, no freehold estate or easement can have been passed. Although, in such cases, the courts commonly say that a mere license has been acquired,[4] yet they generally allow to these licenses most of the qualities of easements.[5] And indeed the true nature of the vendee's interest seems to be that of an equitable right to an easement.[6] A mere license expires with the death of the licensor; but it is hard to believe that any court of equity would allow graves or gravestones to be interfered with by successors of vendors of burial lots, at least if they took with notice of the graves. The requisites for an equitable enforcement of agreements for easements seem all present in agreements for the sale of burial lots, even where there is no writing, — a complete and sufficient contract the terms of which are mostly established by custom, valuable consideration, and acts of part performance unequivocably referable to the supposed agreement.[7] The practical result, that the graves are kept permanently undisturbed, is plainly in harmony with common sense and justice.

Where one is only a life tenant of land, however, it is difficult to see how his powers can extend to selling burial lots in fee simple or as easements enforceable either at law or in equity, since a life tenant can neither convey away his land piecemeal nor incumber it with easements. When, however, the land has already been devoted to the business of conducting a private cemetery, considerations of justice and policy would allow the life tenant to continue the business, and consequently to sell burial lots; for otherwise he is likely to receive little beneficial use of the land. The legal basis for such a rule is hard to find. The Supreme Court of the District of Columbia recently attained this result, on the analogy of a life tenant's right to continue the operation of mines and quarries though the corpus of the estate is thereby diminished, or exhausted. *Hill* v. *Moore*, 33 Wash. L. Rep. 549. The distinction, however, is clear between the mere severance of part of the physical substance of the inheritance by a life tenant with the right to work

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[10] See Brodbine *v.* Revere, 182 Mass. 598.

[11] *Cf.* Nelson *v.* State Board of Health, 186 Mass. 330.

[1] Commonwealth *v.* Mt. Moriah Cemetery Ass'n, 10 Phil. (Pa.) 385.

[2] Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 503.

[3] See *e. g.* in the case of church cemeteries, Richards *v.* Northwest, etc., Church, 32 Barb. (N. Y.) 42; but *contra*, *In re* Brick, etc., Church, 3 Edw. Ch. (N. Y.) 155.

[4] Dwenger *v.* Geary, 113 Ind. 106; Partridge *v.* First, etc., Church, 39 Md. 631; McGuire *v.* Trustees, etc., of Cathedral, 54 Hun (N. Y.) 207.

[5] See Perley, Mortuary Law 178.

[6] Moreland *v.* Richardson, 22 Beav. 596; Conger *v.* Treadway, 50 Hun (N. Y.) 451.

[7] See Wiseman *v.* Lucksinger, 84 N. Y. 31, 38. See also Gale, Easements, 7th ed., 58, 59.

open mines, and an actual incumbrance of the inheritance with easements, or the complete extinguishment, by a conveyance in fee, of the entire estate in the land; yet, since the only alternative appears to be a decision, the practical effect of which is to deprive the life tenant of the beneficial use of the land, perhaps this loose analogy furnishes the best, though an unsatisfactory, avenue of escape from a perplexing problem.

CONSTITUTIONALITY OF A STATE TAX ON MOVABLES SITUATED OUTSIDE THE STATE. — The power of a state to tax persons and things within its confines is limited by the clause of the Constitution, that no person shall be deprived of property without due process of law. In considering what forms of taxation do not violate this clause, two kinds of taxes must be recognized. Imports, inheritance taxes, licenses, etc. are examples of the first class. They are charges imposed by the state upon persons for privileges granted to them.[1] The nature of the second class is entirely different. In levying taxes of this sort, the state is apportioning the expenses of government among all its citizens. Two methods of making this apportionment which satisfy the requirement of due process of law may be suggested. Each person can be called upon to bear a proportion of the expenses of government commensurate to the proportion of benefit he has received from the state. The second method would be to apportion the taxes among the citizens of the state in proportion to their relative abilities to pay them.[2] A tax upon a person the amount of which is determined by the value of the property he owns within the state is an example of the first method of apportionment, because the best measure of the amount of protection derived from the state is the amount of property owned. A tax on incomes on the other hand exemplifies the tax upon a person in proportion to his ability to pay. Of course these are but rough approximations, but so long as either principle underlies the tax it is valid.

Does a tax upon a person based upon the amount of personal property owned by him outside of the state meet either requirement? Such a tax has been supported by some decisions,[3] by the text-writers,[4] and by long usage; but it has at length been declared unconstitutional by the Supreme Court of the United States. *Union, etc., Company* v. *Kentucky*, U. S. Sup. Ct., Nov. 13, 1905 (two judges dissenting). This result is the logical outcome of two previous decisions,[5] and of the proposition (which the court assumes as undeniably settled) that realty without the state cannot be taxed at the domicile of the owner.[6] Certainly such a tax is not a charge upon a person based upon the amount of protection he derives from the state, for the maxim *mobilia sequuntur personam* has been entirely discredited.[7] It has been said that, being based upon the wealth of a citizen, it is a tax upon him graduated according to his ability to pay.[2] This is not, however, a tax upon a person based upon his ability, as compared with the ability of other

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[1] Matter of Swift, 137 N. Y. 77, 88; Knowlton *v.* Moore, 178 U. S. 41, 47.
[2] See Beale, Foreign Corporations, § 483.
[3] Wheaton *v.* Mickel, etc., May, 63 N. J. L. 525.
[4] See Wharton, Conflict of Laws, 3d ed., § 80 a.
[5] Louisville, etc., Co. *v.* Kentucky, 188 U. S. 385; Delaware, etc., Co. *v.* Pennsylvania, 198 U. S. 341.
[6] Louisville, etc., Co. *v.* Kentucky, *supra*, at 398.
[7] See Hoyt *v.* Commissioners of Taxes, 23 N. Y. 224.